

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

**BOSTON GAS COMPANY
d/b/a KEYSPAN ENERGY
DELIVERY NEW ENGLAND**

D.T.E. 03-40

**RESPONSE OF THE ATTORNEY GENERAL TO
BOSTON GAS COMPANY'S OPPOSITION TO HIS
MOTION TO STRIKE PORTIONS OF THE COMPANY'S INITIAL BRIEF**

On September 26, 2003, Boston Gas Company, D/B/A KeySpan Energy Delivery New England ("Company"), filed its Opposition ("Opposition") to the Attorney General's September 18, 2003, Motion To Strike Portions Of Boston Gas Company's Initial Brief ("Motion") and his September 19, 2003, Supplement To The Motion. In its Opposition, KeySpan argues that all ten sets of statements in its Initial Brief that the Attorney General challenged in his Motion and Supplement "are either based on direct factual evidence in the record, or involve reasonable inferences from that evidence." Company Opposition at 13.¹ KeySpan's arguments are without merit; the Department should strike all of the passages cited by the Attorney General in his Motion. The Attorney General rests on the arguments in his Motion except for the following specific responses.

Issue 1 -- pre-construction IRR calculations and post-construction explanation of cost overruns.

KeySpan argues that the inferences it drew in its Initial Brief on this point are justified.

¹ In arguing that it may draw reasonable inferences in its brief, KeySpan improperly cites two irrelevant cases. These cases only mention, in passing, judicial review of reasonable **agency conclusions** based on inferences; they say nothing about **parties' briefing arguments** based on inferences. *Boston Gas Company v. Department of Telecommunications and Energy*, 436 Mass. 233, 238 (2002); *Arthurs v. Board of Registration in Med.*, 383 Mass. 299, 310 (1981).

Company Opposition at 2-4. The only record evidence KeySpan cites in support, however, relates to Company **policy** (not to proceed with a capital addition unless the pre-construction internal rate of return (“IRR”) exceeds 11.75%), not Company **actions** on particular projects that the Attorney General challenged on cross examination. The Company failed to prove that its decisions to commence the 16 projects in excess of \$100,000 were prudent and reasonable in light of the circumstances that then existed.

The Company inappropriately attempts to shift its burden of proof to the Attorney General. KeySpan blames the Attorney General for the fact that the record contains only post-construction IRR calculations, not the pre-construction IRR calculations that are relevant on whether the Company was prudent in proceeding with the capital addition. Company Opposition at 3. Once the prudence of a cost is challenged through cross examination, the company has adequate notice of the issue and the burden of proof falls squarely on the company, not on anyone else. *New England Telephone and Telegraph Company*, D.P.U. 86-33-D, p. 9 (1987). KeySpan should have produced that evidence while the record was open, not on brief or in response to a motion to strike.

Contrary to the Company’s claim, it also failed to provide reasons for cost increases on all 16 challenged projects. Company Opposition at 4. The Company’s Opposition fails to cite any record evidence of its justifications for four of the challenged capital projects whose IRR fell below 9.38%. AG RBr. at 16, n. 10; RR-AG-59.

The Department therefore should strike the Company’s unsupported assertions on brief on this issue. *AT&T Communications*, D.P.U. 91-79, p. 8 (1992).

Issue 2 -- West Roxbury capital addition cost overrun.

The Company attempts to explain the reasons for a \$500,000 cost overrun of the West Roxbury plant addition. Company's Opposition, pp. 4-5.

KeySpan's attempts at explanations still do not provide the Department with record evidence of its cost-containment efforts for the West Roxbury project. *Boston Gas Company*, D.P.U. 93-60, pp. 35-36. The Company's attempts at explanations involve speculation, not record evidence or reasonable inferences. The work order in evidence (Exh. AG-12B) clearly shows that the Company spent an additional \$443,000 for the project on October 25, 2002, more than two years after the project began. Nothing in the Company's Opposition or briefs explains what happened that suddenly caused this huge expense, why this level of expense was necessary, or what steps the Company took to monitor and control this project's costs, even though the Attorney General repeatedly asked for an explanation as part of the record. The Department should grant the Motion and strike the challenged portions from the Company's briefs. AG Motion, pp. 3-4.

Issue 3 --Net present value calculation for sales promotional expenses.

KeySpan appended to its Opposition a two page table that finally purports to document how it calculated the net present value in its cost benefit analysis for its sales promotional expenses. Parties may reasonably support their briefs with properly documented arithmetic calculations based on record evidence, but KeySpan failed to do so in either of its briefs on this issue. The Department therefore should strike the two portions of footnote 38.

Issue 4--Unsupported claims about advertising invoices.

The Company's Opposition failed to show any supporting record evidence for its contentions. Contrary to the Company's assertion, the record does not show that \$2,717 is the total amount of Company expense attributable to developing and airing the Value Snobs radio advertisement. Company Opposition, p. 8. The record evidence, the invoices (Exh. AG 25-1(4), (5), and (6)), do not show that the Company was billed only \$2,717 of development costs or airtime charges for the Value Snobs radio advertisement. The Company's Opposition did not document how the Company calculated that total, based on record evidence, as the only amount attributable to the unused radio advertisement. The record evidence does not break down development costs or airtime charges by advertisement and does not support the Company's contentions regarding the unused radio advertisement. Therefore, the Department should grant the Motion and should strike the Company's unsupported claims regarding the Value Snobs radio advertisement. AG Motion, p. 4.

Issue 5 -- Staffing Level Reductions

KeySpan claims that it is a "reasonable inference" that staffing reductions were consistent with collective bargaining because the Union was a party and did not introduce evidence to the contrary. Opposition at 10. The Company again inappropriately attempts to shift its burden of proof to other parties. When an issue is raised on cross examination, the burden of proof falls squarely on the Company, not on anyone else. *New England Telephone and Telegraph Company*, D.P.U. 86-33-D, p. 9 (1987). KeySpan should have produced that evidence while the record was open, not by attempting to assert it as fact in its Initial Brief.

Issues 6-8

The Company's only response was to cite several exhibits broadly, without showing

which statements in those exhibits, some of which are very large, support KeySpan's assertions in its Initial Brief. KeySpan's failure to provide more specific citations and the record evidence speak for themselves; the Department should strike the Company's unsupported assertions.

Issue 9 -- reasons for low pressure for 1,500 streets.

The Company does not dispute that the low pressure must come from some source. Opposition at 11-12. KeySpan states that system load, not leaks or other cause, is the source of the low pressure. The Company cited no record evidence, however, that an increase in load is what affected all 1,500 of these streets or that the problems all began suddenly in 2000.² The Company also offered no evidence from a witness qualified as competent based on engineering expertise that the low system pressure did not result from system deterioration, design deficiencies or leaks of any classification.

Once a cost is challenged through cross examination, the Company bears the burden to prove, with credible record evidence, that it is properly charged to ratepayers. *New England Telephone and Telegraph Company*, D.P.U. 86-33-D, p. 9 (1987). KeySpan should have produced that evidence while the record was open, not on brief or in response to a motion to strike. What the Company cannot do is testify on brief to facts it did not or could not produce during the hearings in this case.

For these reasons, the Department should grant the Attorney General's Motion and strike

² The Company still has not adequately explained why it did not retain the pre-2000 system modeling reports.

the portions of KeySpan's Initial Brief that were not adequately supported with record evidence.

Respectfully submitted,

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